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USES AND MISUSES OF COMPARATIVE LAW IN
INTERNATIONAL HUMAN RIGHTS: SOME
REFLECTIONS ON THE JURISPRUDENCE
OF THE EUROPEAN COURT OF
HUMAN RIGHTS

*Paolo G. Carozza**

Virtually all of Mary Ann Glendon's work can be seen as part of a persistent effort to open some windows in the edifice of American law and allow cross-currents of foreign experience to blow fresh insight into the rooms of our republic. In her critique of contemporary strains of rights discourse in the United States, she makes the case against American insularity quite directly: "In closing our own eyes and ears to the development of rights ideas elsewhere, our most grievous loss is . . . the kind of assistance . . . that can be gained from observing the successes and failures of others."¹ She illustrates this point in large part by contrasting the judicial styles of the United States Supreme Court and the European Court of Human Rights in their respective decisions regarding the criminalization of homosexual sodomy.² Much of the strength of the European Court's approach, Glendon suggests, is due to the judges' openness to comparative experience and their sensitivity to the divergence of national legal traditions in determining both the scope of the norm at issue and the appropriate reach of the Court's resolution of the dispute.

In concluding that Northern Ireland's statute contravened the European Convention on Human Rights, the European Court relied heavily on its observation that "in the great majority of the member

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1 MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 170 (1991).

2 *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981).

States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied."³ At the same time, the European Court acknowledged that all of the Member States had *some* sort of legislation regulating homosexual conduct, and on that basis "accepted that some form of legislation is 'necessary' to protect particular sections of society as well as the moral ethos of society as a whole."⁴ Such a search for common legal norms and approaches among the national laws of the Member States has become a routine element of the European Court's justification of its decisions, both in extending the reach of human rights norms and in limiting them.⁵ Among some comparatists, it has provoked effusive enthusiasm: "The European Court serves as a laboratory for the circulation of legal models that comparativists have dreamt of for many years."⁶

In this essay I want to explore a little further the role that such inter-state comparisons play in giving content and scope to international human rights norms, with particular reference to the jurisprudence of the European Court of Human Rights. Glendon's suggestion that this strategy is one of the European Court's virtues deserves some further scrutiny. It is not immediately obvious that this should be the case. In principle, aren't we dealing with binding international, universal, human rights norms?⁷ Linking their requirements to the results of some comparison between states' national laws seems to deprive them of exactly the supranational status that they have achieved though international treaty. That may, in turn, invite an overly timid enforcement of human rights norms, where the least common denominator among the states surveyed will be the only identifiable standard. Conversely, to the extent that the technique is used not to assess compliance with already accepted norms but instead to fashion fundamentally new human rights claims, it could lead

3 *Dudgeon*, 45 Eur. Ct. H.R. at 23-24.

4 *Id.* at 21.

5 See ELIAS KASTANAS, *UNITÉ ET DIVERSITÉ: NOTIONS AUTONOMES ET MARGE D'APPRECIATION DES ÉTATS DANS LA JURISPRUDENCE DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME* 186-224, 306-22 (1996); HOWARD CHARLES YOURROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* 193-96 (1996).

6 Valerio Grementieri, *Comparative Law and Human Rights in Europe*, in *EUROPEAN LEGAL TRADITIONS AND ISRAEL* 369, 375 (Alfredo Mordechai Rabello ed., 1994).

7 Admittedly, as I already noted, Glendon is concerned with evaluating the United States Supreme Court *qua* constitutional court, not the European Court *qua* international court. This essay thus does not present a criticism of Glendon's point, but merely takes it as a point of departure for some further reflections.

to the flattening of the diversity of national practices and cultures simply because a certain number of states have made common political decisions regarding contested social values.

These concerns are by no means limited to the European context, moreover, and are likely to be more pronounced outside of it. Thus, while the narrow focus of this brief discussion is on the European Court, I hope to draw from it some lessons for the uses of comparative law in international human rights more generally.

I conclude that what comparative law cannot do is precisely what the European Court's jurisprudence implicitly claims for it. It is not an objective "method" that yields clear conclusions about the proper scope of uniform international standards. It cannot give us the normative basis for making judgments about when common standards ought to be enforced and when diversity should be given freer play. Nevertheless, in part because of the tensions between universalist "common public law" aspirations and the particularist, relativist tendencies of a comparative approach to international human rights, inter-state comparisons can have both theoretical and practical value. They help strengthen common understandings by giving specific content to the scope of broad, underdetermined international human rights norms, while at the same time they help to reveal the contingency and particularity of the political and moral choices inherent in the specification and expansion of international human rights norms that are sometimes too facilely assumed to be "universal."

I

To understand the role of inter-state comparative references⁸ in European Court of Human Rights decisions, we need first to mention three other related principles of justification fundamental to that Court's jurisprudence. First, the Court established early on that the European Convention on Human Rights establishes an "autonomous" normative system. In other words, although the Convention draws its vocabulary from ordinary usage and from the constitutional traditions of the Member States,⁹ the Court will give those words a meaning specific to the Convention, drawn from sources internal to the Conven-

8 I deliberately avoid calling the Court's exercises either "comparative *analysis*" or "comparative *method*." As will be more apparent later on, there appears to be little analysis and even less method involved.

9 For example, Article 6(1) of the Convention provides, in part, that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, 228 (1955) [hereinafter Convention].

tion system, such as the Court's prior case law or the object and purpose of the treaty.¹⁰ Second, the Court has explicitly adopted a dynamic approach to the interpretation of the Convention, understanding the terms of the treaty not in their original 1950s context but in the light of contemporary European society.¹¹

Third, and most directly important for our purposes, the Court has developed a doctrine of judicial self-restraint, the "margin of appreciation," which it accords the Member States in assessing their compliance with certain of the treaty's provisions. The margin of appreciation doctrine has been described as the latitude of deference or error which the Strasbourg organs will allow to national bodies before it is prepared to declare a violation of one of the Convention's substantive guarantees.¹² The doctrine overtly injects a certain degree of relativity into the application of the Convention's norms,¹³ and has thus been considered the cornerstone of the Convention's respect for the diversity of nations.¹⁴

Like any set of interpretive canons, these three principles, among the others the Court employs, are clearly in tension with one another, and any one taken to its logical limits would contradict another. For example, the principle of autonomy limits interpretation to internal elements of the Convention system while dynamic interpretation explicitly looks to the external evolution of the society and economy. Similarly, the unity and consistency of application sought through autonomous interpretation could be understood to preclude any margin of appreciation to the Member States; a fixed or consistent margin of appreciation could prevent an evolution and expansion of common standards through dynamic interpretation. Which canon is chosen to

10 See F. Matscher, *Methods of Interpretation of the Convention*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 63, 70-73 (R. St. J. Macdonald et al. eds., 1993) [hereinafter *EUROPEAN SYSTEM*].

11 *Id.* at 68-70. The principles of autonomy and normative evolution may both appear entirely typical in a *constitutional* jurisprudence; it is as principles of interpreting an international treaty that they are rather bold, since both seem to imply the possibility of the development of normative obligations independent of the consent of any one of the Member States. Cf. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27, art. 31 (providing that treaties shall be interpreted "in accordance with the plain meaning to be given to the terms of the treaty in their context," and defining "context" in static terms).

12 YOROW, *supra* note 5, at 13. There is an extensive body of literature on the margin of appreciation doctrine, but this is without doubt the most comprehensive study in English to date.

13 R. St. J. Macdonald, *The Margin of Appreciation*, *EUROPEAN SYSTEM*, *supra* note 10, at 83.

14 See generally KASTANAS, *supra* note 5.

prevail over the others in a particular context, therefore, can be decisive. Taking them as a whole, it is not unreasonable to conclude, with Olivier de Schutter, that "the interpretive tools of the European Court of Human Rights permit it to conduct all battles, and in the way it wants."¹⁵

In the jurisprudence of the Court, inter-state comparisons often provide the rhetorical key that opens the door to one or the other of these interpretive techniques. Comparisons fit into the dynamic in one of two ways. On the one hand, the Court may assert that a comparison of Member State laws reveals an emerging or established consensus among them, thus contributing to the evolution of the Convention's normative requirements. That new norm is then part of the autonomous order of the Convention, and thus is applicable to all Member States, not just those who have contributed to the consensus in the first instance. On the other hand, where the Court emphasizes that there is a great diversity of laws among the Member States and no common European legal standard, it is likely to find that the matter is within the margin of appreciation of the Member State in question.

Although the limited space of this essay does not permit a detailed review of the many cases in which the Court has followed one of these two patterns, it is useful to illustrate the paradigms with a few cases involving "the right to respect for . . . private and family life" set forth in Article 8 of the Convention.¹⁶ In addition to *Dudgeon v. United Kingdom*, discussed by Glendon, one of the best known examples of the Court's use of comparative references came in *Marckx v. Belgium*, in which the applicant complained that the Belgian Civil Code discriminated against children born outside of a marriage and against their mothers. Such "illegitimate" children had to be legally recognized by the mother and subsequently adopted by her to acquire many of the rights accorded to "legitimate" children by birth, and

15 Olivier de Schutter, *L'interprétation de la Convention Européenne des Droits de L'Homme: Un Essai en Démolition*, 70 REVUE DE DROIT INT'L, DE SCIENCES DIPLOMATIQUES, POLITIQUES, & SOCIALES 83, 92 (1992).

16 The Article provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Convention, *supra* note 9, at art. 8.

even then the "illegitimate" child had more limited rights to inheritance from the mothers' relatives. The Court noted:

It is true that, at the time when the Convention . . . was drafted, it was regarded as permissible and normal in many European countries to draw a distinction in this area between the "illegitimate" and the "legitimate" family. However, the Court recalls that this Convention must be interpreted in light of present-day conditions. . . . In the instant case, The Court cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim "*mater semper certa est*."¹⁷

Accordingly, the Court concluded that the manner of establishing maternal affiliation under Belgian law violated, inter alia, Article 8 of the Convention. Comparison justified the expansion of the Convention's norms beyond what the Court itself acknowledged to be the treaty's original scope.

By contrast, the Court has used comparative references to generally resist finding violations of Article 8 (either in its reference to private life or to family life) in connection with the legal recognition of transsexuals. In a succession of cases beginning in 1986, the Court repeatedly held that Article 8 did not impose positive obligations on the Member States to recognize in law the status of transsexuals by allowing amendment of their birth certificates (which would, in turn allow them legally to marry, among other things). In both *Rees v. United Kingdom*¹⁸ and four years later in *Cossey v. United Kingdom*,¹⁹ the Court noted that in light of "the diversity of practices followed and the situations obtaining in the Contracting States," the positive obligations inherent in the notion of "respect" "will vary considerably from case to case."²⁰ In particular, the Court emphasized that:

Several States have, through legislation or by means of legal interpretation by administrative practice, given transsexuals the option of changing their personal status to fit their newly-gained identity. They have, however, made this option subject to conditions of varying strictness and retained a number of express reservations In other States, such an option does not—or not yet—exist. It would therefore be true to say that there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage. Accord-

17 *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) at 19 (1979).

18 *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) (1986).

19 *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) (1990).

20 *Cossey*, 184 Eur. Ct. H.R. (ser. A) at 15; *Rees*, 106 Eur. Ct. H.R. (ser. A) at 15.

ingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation.²¹

Although the Court found no breach of Article 8 in either case, it concluded both by emphasizing that since the Convention "has always to be interpreted and applied in the light of current circumstances . . . [t]he need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments."²²

When the Court did revisit the question a third time a mere two years later in *B. v. France*, it noted the applicant's contention that there had been new developments—including new legislation and case law of many of the Member States—and acknowledged that "it is undeniable that attitudes have changed."²³ Nevertheless, the Court observed that the legal implications of finding a violation of Article 8 here were complex and would affect many different areas of domestic law, on the details of which "there is as yet no sufficiently broad consensus between member States of the Council of Europe to persuade the Court to reach opposite conclusions to those in the *Rees* and *Cossey* judgments."²⁴ Significantly, however, the Court went on to compare the French laws and the English laws at issue in the *Rees* and *Cossey* cases, precisely with regard to some of these details it claimed to be beyond a European consensus. In France, in contrast to England, a transsexual's difficulty in changing her name and identification documents to reflect her apparent sex was so onerous that the applicant found herself "daily in a situation which, taken as a whole, is not compatible with the respect due to her private life. Consequently, even having regard to the State's margin of appreciation . . . there has thus been a violation of Article 8."²⁵

B. v. France suggests that the evolution of the autonomous norms of the Convention is inching toward a fuller acknowledgment that the legal status of transsexuals implicates Article 8. As more European states fashion a new legal regime to deal with the issues at stake, presumably the scope of the Convention's norms will broaden as well. Lest we overestimate the speed of this development, however, it is worth noting that in one of the more recent decisions of the Court, *X, Y and Z v. United Kingdom*, the Court found no violation of Article 8 in Britain's refusal to register a female-to-male post-operative transsexual

21 *Rees*, 106 Eur. Ct. H.R. (ser. A) at 15; cf. *Cossey*, 184 Eur. Ct. H.R. (ser. A) at 16.

22 *Rees*, 106 Eur. Ct. H.R. (ser. A) at 19; cf. *Cossey*, 184 Eur. Ct. H.R. (ser. A) at 17.

23 *B. v. France*, 232 Eur. Ct. H.R. (ser. A) at 49 (1992).

24 *Id.*

25 *Id.* at 53–54.

as the father of a child born by artificial insemination by donor (AID) to the transsexual's partner.²⁶ Once again, the Court relied heavily on its inter-state comparisons. Despite the applicant's and the European Commission's assertions of "a clear trend within the Contracting States towards the legal recognition of gender reassignment," the Court concluded that there were no common European standards regarding either the parental rights of transsexuals or the legal status of the non-biological father of a child conceived by AID. It concluded, "since the issues . . . touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, the respondent State must be accorded a wide margin of appreciation."²⁷

The overly abbreviated decisions above do not do justice to the full range of cases in which inter-state comparisons by the European Court have been key.²⁸ On the other hand, in a certain sense the examples cited are all too complete. Considering that the comparative references in these cases, and in significant other ones, are the critical turning points in the Court's justification of whether to assert an evolution of the Convention's norms, and of whether to lean toward recognizing either an "autonomous" norm or a wide margin of appreciation, the Court's analysis is remarkably casual, superficial, and incomplete. It is true that the diverse national backgrounds of the judges promotes, at least passively, some comparative perspective in the Court's decisions (particularly in cases where a plenary Court is gathered).²⁹ Nevertheless, almost never has the Court said, specifically, which countries it has surveyed and referred to, or what domes-

26 *X, Y and Z. v. United Kingdom*, 24 Eur. H.R. Rep. 143 (1997). This time, Article 8 was implicated in its reference to family, not private life.

27 *Id.* at 151 (citing *Rees*, 106 Eur. Ct. H.R. (ser. A), and *Cossey*, 184 Eur. Ct. H.R. (ser. A)).

28 Among many others, see, e.g., *Wingrove v. United Kingdom*, 24 Eur. H.R. Rep. 1 (1996); *Stjerna v. Sweden*, 299-B Eur. Ct. H.R. (ser. A) (1994); *Sigurjónsson v. Iceland*, 264 Eur. Ct. H.R. (ser. A) (1993); *Open Door & Dublin Well Woman v. Ireland*, 246 Eur. Ct. H.R. (ser. A) (1992); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988); *F. v. Switzerland*, 128 Eur. Ct. H.R. (ser. A) (1987); *Johnston v. Ireland*, 112 Eur. Ct. H.R. (ser. A) (1986); *James et al. v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) (1986); *Abdulaziz v. United Kingdom*, 94 Eur. Ct. H.R. (ser. A) (1985); *Rasmussen v. Denmark*, 87 Eur. Ct. H.R. (ser. A) (1984); *Albert & Le Compte v. Belgium*, 58 Eur. Ct. H.R. (ser. A) (1983); *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) (1979); *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) (1978); *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976); *National Union of Belgian Police v. Belgium*, 19 Eur. Ct. H.R. (ser. A) (1975); *De Wilde, et al. v. The Netherlands*, 12 Eur. Ct. H.R. (ser. A) (1971); *Belgian Linguistics Case*, 6 Eur. Ct. H.R. (ser. A) (1968).

29 See Rudolf Bernhardt, *The Convention and Domestic Law, in EUROPEAN SYSTEM*, *supra* note 10, at 35.

tic laws it has compared, let alone anything substantive about the method of its "comparison" (formal? functional? certainly not critical). It is no surprise that the *Cossey* decision provoked a bitter dissent that attacked, *inter alia*, the majority's comparisons as both theoretically and factually misguided.³⁰ The only characteristics of the Court's comparative "method" on which virtually all commentators have agreed are its lack of depth, rigor, and transparency.³¹

One could easily draw from this a conclusion that the need is for more methodological discipline: better, or at least more, comparative study, and a more systematic and principled approach to the comparative exercise.³² No doubt such calls are well justified and I would wholeheartedly endorse such efforts. The Court's haphazard and overly casual assertions of similarities or divergences in national laws constitute a serious weakness that undermines the legitimacy of the Court by rationalizing its crucial turns in justification on little more than hunches about European commonality and patterns of legal, social, and moral development.

But, more importantly for our purposes, however much we may seek and propose methodological refinement, comparative law in the European court will not, because in principle it cannot, solve some of the more thorny questions of principle that it raises. Our examples here are sufficient to illustrate that the Court's comparative exercise is less a means of interpretation than one of justification.³³ The process of comparison is not a "method" that actually yields the *meaning* of a Convention provision, but instead is used to legitimate the Court's exercise of discretion: if there is a sufficient degree of commonality in (some of) the Member States' laws the Court may accept the evolution of the Convention's norms to a new situation; a lack of sufficient com-

30 See *Cossey*, 184 Eur. Ct. H.R. (ser. A) at 27-29, 35-37 (Martens, J., dissenting).

31 See P. VAN DIJK & G.J.H. VAN HOOFF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 603 (2d ed. 1995); KASTANAS, *supra* note 5, at 192, 196; YOUROW, *supra* note 5, at 195; Bernhardt, *supra* note 29, at 35; Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, in 56 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKRECHT* 240, 284 (1996); Grementieri, *supra* note 6, at 375; Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 *CORNELL INT'L L.J.* 133, 135 (1993); François Ost, *The Original Canons of Interpretation of the European Court of Human Rights*, in *THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS* 283, 305 (Mireille Delmas-Marty ed., 1992).

32 See Bernhardt, *supra* note 29, at 35-36; Brems, *supra* note 31, at 284-85; Helfer, *supra* note 30, *passim*.

33 Cf. Macdonald, *supra* note 13, at 123 (nothing that margin of appreciation is a principle of justification rather than interpretation).

monality supports the Court's refusal to recognize the new claim. Thus, an evaluation of the uses of comparison depends more on *why*, rather than *how*, the European Court has used inter-state comparisons in its decisionmaking.

II

Why should international standards of human rights be drawn from a consensus of national legal traditions at all? Typically, there are two types of justifications of the European Court's comparative exercises offered. The Preamble of the Convention suggests one, describing the treaty as an agreement among "the Governments of European Countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law."³⁴ The norms of the Convention were drawn originally from that common tradition. Thus, Eva Brems concludes that the Court's comparative references

can only be explained by the fact that the European Convention on Human Rights is not considered to be a superstructure imposed on the contracting states from above, but a system of rules which are part of the common European heritage. It is because the European system is supposed to be derived from the national systems of the member states that the comparative argument takes so much weight.³⁵

In applying and interpreting them, it is argued, their evolution should be no less dependent on the developments within those ongoing, vital constitutional traditions.³⁶ Indeed, since the Convention essentially consists in the elevation of constitutional concepts to the international plane, it may not even be possible to understand, interpret, and apply the Convention provisions without seeking their meaning to some extent in national legal systems.³⁷

This view is strengthened by an understanding of the supranational nature of the Convention system as subsidiary to the national legal and political systems. In other words, domestic law and politics are considered to be the primary mechanisms of implementation and realization of the human rights standards of the Convention, while international supervision only comes into play at a secondary level.

34 Convention, *supra* note 9, *Preamble* at 222-24.

35 Brems, *supra* note 31, at 276-77. See also W.J. Ganschof van der Meersch, *Reliance, in the Case-Law of the European Court of Human Rights, on the Domestic Law of the States*, 1 HUM. RTS. L.J. 13, 15-16 (1980).

36 See, e.g., Grementieri, *supra* note 6, at 374.

37 See Ost, *supra* note 31, at 305-09.

Since virtually all of the details of actual implementation of the Convention norms will thus be effected through national legal systems, the only way to adequately assess the compliance of any one domestic order is by reference to other domestic legal systems.

Comparative analysis based on arguments of historical commonality of values and the Convention system's subsidiarity to national law and politics are perhaps best typified by the many cases which use comparative references to determine whether a restriction on a specified right is "necessary in a democratic society."³⁸ As Mireille Delmas-Marty has noted:

The criterion of democratic necessity is implicitly derived from principles common to Western democracies [I]t is precisely because Europe was not born with the Council of Europe or the European Economic Communities just after the war, but very much earlier, at the convergence of great currents of thought which crossed the continents since Roman law, that it is possible now—literally—to extract the contents of a shared "democratic necessity."³⁹

A second, very different type of justification, focuses less on the past political traditions of the states or on the systemic subordination of the international to the national, but instead on the political present, where the effective implementation and perceived legitimacy of the Court's judgments depend on their acceptance by the States in their internal legal orders. A judgment can be ignored; the Convention could even be denounced. Thus R. St. J. Macdonald, one of the judges of the Court, understands the search for common European standards through inter-state comparisons to be "part of . . . [a] pragmatic gradualist project" that "reflects the increasing legitimacy of the Convention organs in the European legal order."⁴⁰ While arguably the European human rights regime has today acquired a sufficient aura of legitimacy to command compliance solely in virtue of its unreflective acceptance as a "system of law" among the Member States,⁴¹

38 Many of the provisions of the Convention are structured so that first a right is articulated in broad form, then permissible limitations on that right are set forth, one requirement of which is always that the limitations be "necessary in a democratic society." See, e.g., Convention, *supra* note 9, at 230 (covering Article 8).

39 Mireille Delmas-Marty, *The Richness of Underlying Legal Reasoning*, in *THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS* 319, 322 (Mireille Delmas-Marty ed., 1992).

40 Macdonald, *supra* note 13, at 123.

41 See Richard S. Kay, *The European Human Rights System as a System of Law* (1997) (unpublished paper on file with the author) (arguing that the operation of the European human rights system has now achieved acceptance among the Member States as a system of law requiring compliance).

that certainly was not true of the Court throughout most of the half century of its existence. Seeking to ground its decisions, especially the more controversial ones, in the actual practice of the Member States helped it establish its political legitimacy over time and helps it maintain legitimacy in the midst of expanding the scope of the Convention's coverage. By apparently displacing the source of the developing norms from the judges on the Court to the other states of the European region, the comparative exercise protects the Court from charges of overreaching judicial activism. It thus helps maintain the viability of the system, making it less likely either that the Convention organs will act contrary to the will of a large number of the constituent states, or that a divergent state will abandon the system out of protest over the Court's intrusion into national political morality.

While these justifications have some merit in explaining what the Court is doing in employing comparisons, they fail to address some of the basic questions raised by the use of comparative references. To the extent that a comparison of state laws and practices yields a *fully* common approach to a norm, the comparison itself is inherently uninteresting and unnecessary.⁴² These are cases that will not come before the Court, and will not engender disagreement, precisely because of the exceptionless consensus. Where the import of the comparative enterprise is difficult to assess is when the comparison yields a Member State that differs from others with respect to some standard of human rights. On the side of the majority, whether it shows commonality or divergence, why should the consensus of "many states" (or a majority or even a supermajority) determine what the scope of supranational norms are? To base the content of obligations on what the states are actually doing has the potential to amount to no more than a vulgar form of positivism, one that certainly contravenes the spirit of international human rights' normative aspirations and idealism. The history of the human rights movement makes it lamentably obvious that even large groups of states might share similar internal norms that all violate some basic aspect of human dignity. And yet, on the side of the minority (or even lone dissenter), why should the obligations it has assumed under international treaties be based on what some number of *other* states has chosen to do at any given time? Surely the Convention did not mean to efface all national differences in the name of uniformity, but instead to set a minimum level of compatibility. In short, a useful defense for using comparative methods in the manner common to European Court decisions needs to be able to tell us why it justifies holding states outside of the consensus to the

42 Cf. Ost, *supra* note 31, at 305.

norm developed within it, or alternatively, why a lack of sufficient consensus justifies permitting states to vary from a norm that could be derived from other sources (political, textual, philosophical, economic).

This problem is raised more acutely if we recall that comparative references often work together with other canons of interpretation. Inter-state comparisons pose difficulty in conjunction with a dynamic, evolutionary approach to the Convention's norms. The inquiry then is not what common traditions of the contracting states went into the formulation of the norms in the Convention in its drafting, but what commonalities justify the recognition of new forms of protection. Similarly, comparison's mediation between autonomous interpretation and the state's margin of appreciation highlights the need to explain how a common approach, or lack of it, among a certain number of states justifies binding or leaving discretion in the dissenting one(s).

The historical commonalities of Western European legal traditions do not, logically, provide this reason to enforce commonality with respect to new norms going forward in time, nor for refusing to recognize a norm merely because it lacks that common ground. That, historically, the contracting states to the Convention found common ground to support the commitments they made in the treaty could equally well suggest that where a state does not share the otherwise "common ground" with respect to newly developed or extended norms there should be *no* enforcement of the norm, at least with respect to that differing state. If the scope and content of the Convention norms were not considered to be evolving, then the historical commonality among Member States might provide some justification for holding each to the standard prevailing among the many at the time of the drafting of the Convention and conversely for allowing a margin of appreciation where there was no common norm. In that case, the canon would amount to little more than a tool for an originalist approach to understanding what obligations the states intended to assume.⁴³ Even if it were theoretically possible to maintain such a temporally static hermeneutic, in any event the Court's explicit adoption of a dynamic, evolutive understanding of the Convention

43 Even in this case, the assumption may be unwarranted. As Dinah Shelton has pointed out to me, even in seeking the "original intent" of human rights treaties it is more reasonable to conclude that the parties agreed to a higher international standard precisely out of a conviction that the internal laws of the contracting states had been insufficient to protect human rights adequately.

obligations reduces the historical commonality of the Member States to a premise with merely descriptive, not normative, implications.

The same difficulty defeats the corollary argument about the subsidiary nature of international supervision. The Court's necessary examination of impugned domestic norms by reference to other countries' domestic norms does not justify the task that the Court claims for its comparative references. Again, the Court uses them to judge when sufficient national similarities should result in the recognition and enforcement of a uniform norm, and when sufficient national divergences should result in the according of a wider margin of discretion. The subsidiary status of international control should logically contribute to the development of a sound margin of appreciation doctrine by compelling consideration of the vertical separation of authority between the national and international planes,⁴⁴ but why should that consideration be based on whether other states follow similar or different domestic arrangements?

Like the argument from historical commonality, the problem is exacerbated by considering the way that inter-state comparisons work together with another interpretive canon of the Court—this time, autonomous interpretation. If the Convention norms were *only* derived from and subsidiary to national norms, perhaps inter-state comparisons would be by default the only basis for judgment, however problematic the line-drawing might be. In that case, moreover, each evaluation of a challenged domestic law would have to begin and end with other national comparisons. But the principle of autonomous interpretation makes the hypothesis moot by affirming that the Convention norms, however subsidiary, do exist independently of national law. The Court purports to use comparative references to determine when (and when not) to recognize an autonomous norm and when (and when not) to give discretion to states in spite of an autonomous norm. In other words, the comparative exercise seems to determine whether the Convention standards will be subsidiary to the states on a particular matter or not. Thus, the open question of subsidiarity is the *object* of the comparative inquiry; it is not the latter that is made necessary by the former, and it is bootstrapping to suggest both.

The political pragmatist's justification for comparative references certainly gives a plausible, and probable, but ultimately only partial

44 See Jeroen Schokkenbroek, *Judicial Review by the European Court of Human Rights: Constitutionalism at European Level*, in JUDICIAL CONTROL: COMPARATIVE ESSAYS ON JUDICIAL REVIEW 153, 163 (Rob Bakker et al. eds., 1995) (describing the margin of appreciation doctrine as "an expression of a 'vertical' separation of powers between the European and the national levels").

explanation for the Court's use of comparative references as a rhetorical tool. Two brief questions help reveal its limitations. First, now that the political legitimacy of the Court has become much better established as a "system of law," shouldn't we expect justification by inter-state comparisons to diminish or disappear? In fact, we see their continued use on a very prevalent basis. One might respond that the need for political legitimacy through national comparisons will always continue to the extent that the court develops new, expanded, or controversial norms. However, the Court more recently appears to have been using them more to resist such developments (as in the transsexual cases) than to expand them. Second, what will happen to comparative references now that the Council of Europe includes many more states outside of Western Europe, states with much more divergent domestic legal, social, and political traditions?⁴⁵ If the need to establish and maintain institutional legitimacy justifies the use of inter-state comparisons, we should not just expect in practice but actually agree in principle that the dilution of consensus occasioned by the integration of an ever-broader circle of member states should result in a lowering of already established standards (in spite of the principle of autonomy).⁴⁶ In an effort to have its decisions respected, the Court should tend toward the least common denominator arising out of its comparisons and find more occasions where divergences suggest a broad margin of appreciation. If we do not think this appropriate, then the justification for the Court's comparative references seems at least incomplete. This latter point gets to the heart of the matter. No more than the other possible justifications for the Court's comparative exercises, the need for institutional legitimacy cannot in principle tell us anything about when the comparison should result in the imposition of a common, uniform norm and when it should result in an allowance of diversity.⁴⁷

Nevertheless, that argument does hint at at least one reason why comparative law will *always* fall short of providing the principled justification for imposing unity or respecting diversity that the Court

45 The 40 Member States of the Council of Europe now include all European states except Belarus, Bosnia, Monaco, the Vatican, and Yugoslavia. See *The 40 Member States of the Council of Europe* (visited Mar. 27, 1998) <<http://www.coe.fr/eng/std/states.htm>>.

46 That the comparative approach to the margin of appreciation could result in a lowering or restriction of established standards is a commonly mentioned concern. See, e.g., Macdonald, *supra* note 13, at 123-24; de Schutter, *supra* note 15, at 88, but so far the case law of the Court has not resulted in any such cases.

47 Cf. Macdonald, *supra* note 13, at 124 (noting "the dangers of selective justification which pragmatism condones").

claims for it. It reveals the basic fact that the Court is at one and the same time caught between the need to uphold a set of normative principles that are outside of the will of the Member States and the need to ground its decisions to some degree in the consent of the Member States. The contradiction between and yet interdependence of concrete, consent-based reality (*e.g.*, state sovereignty) on the one hand, and normative ideals external to the state (*e.g.*, solidarity and justice) on the other, is integral to any international legal regime,⁴⁸ and perhaps especially to international human rights.⁴⁹ As Judge Macdonald has remarked, "As a supranational institution, the Court faces a genuine difficulty over its proper role. The whole enterprise of rights protection on this scale requires a delicate balance between national sovereignty and international obligation."⁵⁰ Olivier de Schutter has demonstrated very effectively how that bipolar structure of doctrinal justification in international law pervades the entire ensemble of interpretive techniques that the European Court uses.⁵¹ Comparative interpretation, among them, is pulled toward both poles at the same time, and in leaning toward one it already contains within it the arguments for the other. Even my very brief examples earlier are sufficient to show that the comparative exercise tends toward decisions grounded equally and interchangeably in either the reality of state sovereignty ("there is insufficient consensus therefore there is a wide margin of appreciation") or external and superior norms ("there is sufficient consensus to bind the divergent state"). It contains both at the same time, and in this self-contradiction cannot on its own terms provide us with the reasons to choose between one or the other. As Elias Kastanas has recently argued at length, the European Court's jurisprudence is caught simultaneously on the dual horns of affirming unity and respecting diversity.⁵² The two parts of his book, each devoted to one of these tendencies, both contain discussions of the contributions of comparative methods to the value in question.⁵³ Neither

48 See generally MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989).

49 See, *e.g.*, HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 57 (1996).

50 Macdonald, *supra* note 13, at 124.

51 See de Schutter, *supra* note 15, at 94.

52 See KASTANAS, *supra* note 5.

53 See *id.* at 186-224, 306-22.

section shows comparison to be more compelling in the service of one of the values than the other.⁵⁴

Indeed, independent of the structure of international legal argument, by its very nature the process of comparison will pull us toward both unity and diversity. We cannot really compare two legal systems, or norms within them, without being conscious in the first instance of their differences. The more superficial our knowledge of the other, the more likely we are to see in it a mere reflection of our own preconceived ideas and perceptions. Deeper understanding is predicated upon a fuller understanding of what makes each particular. At the same time, the comparison itself, bringing the differences of each to bear on the other, presupposes *some* level of unity, some commonality, otherwise there would be no comparability.⁵⁵ Thus, it is not, epistemologically-speaking, even possible to genuinely compare law without being pulled toward both unity and diversity.

In short, inter-state comparison will not itself give us the reasons to choose in any instance whether to affirm a uniform international standard of human rights or whether to allow the play of difference and discretion among states. This is true in spite of the apparent practice of the European Court, in spite of the commonly proposed explanations for its prevalence, and in spite of any methodological restraint and rigor that some would propose to replace the conclusory superficiality of the Court (in fact, the previous paragraph suggests that a more rigorous comparison would only make the problem more acute). The European Court's way of relying on comparative references to justify the outcome of its decisions is fundamentally a misuse of comparative law.

There are two broad categories of cases where this misuse could have serious consequences for the way that human rights are advanced and respected. First, as new challenges arise that could pose serious risks to human dignity (for example, those relating to health care and the end of life, environmental hazards, or new biotechnology), the Court's search through inter-state comparisons to try to decide whether to recognize an extension of stated human rights norms to the new situation may well reduce the Court's role to the ratification of the *de facto* consensus of the states, even if this obscures or violates the substance of the human values at stake. As Marie-Thérèse

54 Cf. de Schutter, *supra* note 15, at 88 (noting that the result of the Court's comparative interpretation "is always the product of a choice, and it is indeterminate in its consequences").

55 See Paolo G. Carozza, *Continuity and Rupture in "New Approaches to Comparative Law,"* 1997 UTAH L. REV. 657.

Meulders-Klein has remarked, the use of Member State laws to determine the evolution of human rights under the Convention has the effect of introducing relativism and "social self-reference as a mode of producing norms" into universal and transcendent sources, with the effect of making relative even such fundamental concepts as the "person" or "child" who is the bearer of rights.⁵⁶ Second, those who might welcome such a tentative and cautious Court, perhaps on the grounds that the development of supranational standards should not trample on local differences,⁵⁷ can instead worry that comparative references will result in an aggressive extension of common norms at the expense of those cherished particularities. The point is that both of these outcomes are equally likely to result from the Court's justificatory method of comparative law.

III

Does this mean then that we gain nothing by turning to comparative law in assessing international norms of human rights? By no means, although by way of conclusion here I can do no more than sketch in the broadest terms the outlines of a few of the reasons.

The first rests on the almost banal observation that human rights are either violated or respected and protected, in the first instance, within the internal order of states. Any evaluation of compliance or assessment of the ways to promote human rights in those domestic systems must depend on sufficient understanding of the legal ideology, institutions, actors, sources of law, and other elements of legal traditions that comparatists routinely study. Particularly important to human rights, where states often hold up formal legal norms as evidence of their adherence to international standards, is an understanding of differences between formal laws and their functional uses, an inquiry in which comparatists regularly engage. These are ways that comparative law can contribute to the effectiveness of international human rights. While they are tangible and currently underused in the international human rights movement, they are not conceptually difficult.

56 Marie-Thérèse Meulders-Klein, *Internationalisation des Droits de L'Homme et Évolution du Droit de la Famille: Un Voyage Sans Destination?*, in *INTERNATIONALISATION DES DROITS DE L'HOMME ET L'ÉVOLUTION DU DROIT DE LA FAMILLE: ACTES DES JOURNÉES D'ÉTUDES DES 15 ET 16 DÉCEMBRE 1994*, 179, 211 (1996).

57 See, e.g., David M. Smollin, *Will International Human Rights Be Used as a Tool of Cultural Genocide? The Interaction of Human Rights Norms, Religion, Culture and Gender*, 12 J.L. & RELIGION 143 (1995-96).

The problems raised by the comparative aspects of the European Court's jurisprudence, however, relate more fundamentally to the normative development of international human rights. The basic tension between uniformity and diversity central to inter-state comparisons of human rights is just one facet of the most pervasive conceptual problem in international human rights. Rooted in the transcendent value of human dignity, the idea of human rights necessarily contains within it an aspiration to the universal. Rooted in the specificity of religious, moral, linguistic, and political communities, the concrete instantiation of that idea necessarily results in particularity and pluralism. The perennial challenge of thinking about and acting on behalf of human rights is to mediate between these poles, seeking the universal through the particular and giving meaning to the transcendent in the concrete.

One side of this dialectic requires us to seek common cross-cultural understandings of the requirements of human dignity and the common good. The other requires us to recognize that in order to be common understandings, these will necessarily have a high degree of generality, abstraction, and indeterminacy. The specification of general principles of human dignity in concrete situations thus will very often require a complex and uncertain balance of values and the exercise of difficult choices of political morality.⁵⁸ Any one solution might

58 See MERRILLS, *supra* note 11, at 149 (noting that the European Court's differing applications of the margin of appreciation reflects "not so much an inconsistency in the Court's jurisprudence, as . . . that decisions about human rights are not a technical expertise in interpreting texts, but judgments about political morality"). Cf. Joseph H.H. Weiler, *Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights*, in *THE EUROPEAN UNION AND HUMAN RIGHTS* 51 (Nanette A. Neuwahl & Allan Rosas eds., 1995). In discussing the European Union, Weiler notes that the particular balance of fundamental values and social goods that human rights represent in any given society is "an important aspect of the political culture and identity of societies . . . [and] a source of, and index for, cross-national differentiation." *Id.* at 54. He then advances an understanding of the European Union "as a polity with its own separate identity and constitutional sensibilities which has to define its own fundamental balances—its own core values." *Id.* at 66. At the same time, he would subject certain Member State measures to fundamental rights review only for conformity with that State's national standards, not the EU standards, on the grounds of respecting the variations in national identity represented by differing human rights standards. Weiler's analysis provides both support for and also a useful contrast to the problem that I discuss more generally. Neither the European Convention nor other international human rights regimes creates a constitutional polity comparable to the EU; accordingly, the aspects of national identity that a given balance of fundamental values represents are correspondingly wider and less justifiably constrained by supranational order.

be compatible with the broadly understood requirements of human dignity, but no two are likely to be identical.⁵⁹

Comparative law can undoubtedly bear fruit at this level. It has the paradoxical capacity to deepen our understanding and appreciation of the particularities of legal traditions while at the same time helping us transcend their differences by relating them to one another. In human rights, this can have two effects. Comparative study can in some cases relativize "universal" international standards by showing them to be contingent and particular solutions to problems that in fact could have a variety of answers. Thus, the European Court's recognition and privileging of any one view regarding the scope of a human rights norm would lose its air of necessity and determinacy and be seen for what it is: a political choice among competing visions of the requirements of human dignity and the common good. Put another way, comparative law can help us see international human rights as itself constituting a particular legal tradition rather than an autonomous, detached, and acontextual set of norms.⁶⁰ Conversely, though, comparison can move us toward more universal understandings of the broad norms of international human rights by asking what the essential similarities in them are across cultures, and what they have in common that serves to give meaning to the abstract generalities we are trying to comprehend. Some of the most interesting and illuminating comparative human rights scholarship has been that which does not lose sight of either the relativist or the universalist possibilities of comparison.⁶¹

59 Cf. Delmas-Marty, *supra* note 39, at 330-34 (describing the margin of appreciation doctrine in European human rights jurisprudence norms as creating a "heterogeneous space" where "the principle of identity . . . is replaced by the principle of proximity").

60 Cf. David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 636-37. Kennedy describes the historical project of comparative law and its relationship to international law as participation in "the academy's broad ideological project to defend the integrity, autonomy, and pragmatic capacity of the international legal order to remain above the specifics of political dispute." He instead proposes that "[w]e might begin to unravel their work by reading global governance as a local culture." While I note above that a comparative approach to human rights would, in part, do exactly what he advocates, the difference is that my argument here also suggests that a simultaneous and complementary pursuit of more genuinely universal values is both inevitable and desirable.

61 For example, Philip Alston's collection of essays exploring the concept of "the best interests of the child" simultaneously suggests the desirability of universal aspirations and relativist conclusions about the transferability of uniform concepts between international and domestic law. *THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS* (Philip Alston ed., 1994). Similar tensions arise in Abdullahi An-Na'im's explorations of cross-cultural, and especially African and Islamic,

This is at once a more modest and more fundamental role for comparative law than providing the hard, consensus-based legal conclusions of the European Court. It may also seem far less satisfying, given its self-contradictory premises and uncertain consequences. But that takes us full circle back to the work of Mary Ann Glendon: in large part because of her lifelong immersion in comparative methods, few have shown as deep an appreciation for the messy, creative dialectic that propels legal change. She has eloquently conveyed her own deep appreciation of law as an example of the "leaky vessel" of dialectical reasoning, rooted in dynamic tensions between opposing principles, where "premises *are* uncertain and one *can't* be sure of being right, but it is crucial to keep trying to reach better rather than worse outcomes."⁶² And in seeking better outcomes, her example of the uses of comparative law is like having Plato's Athenian stranger among us,⁶³ a paradigm of understanding and appreciating the values inherent in particular traditions, especially our own, while stretching our interpretive framework to more universal horizons. No intellectual task is more basic to the work of human rights.

approaches to universal human rights. See, e.g., HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVE: A QUEST FOR CONSENSUS (Abdullahi A. An-Na'im ed., 1992); Abdullahi A. An-Na'im, *The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts*, 11 EMORY INT'L L. REV. 29 (1997).

62 MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 237-39 (1994) (describing the characteristics of legal reasoning as a form of dialectical reasoning).

63 See MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 5-7 (1987); THOMAS L. PANGLE, THE LAWS OF PLATO (1980).

